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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October 1997 Term

DANIEL HUEREQUE-MERCADO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Submitted:

Charles A. Harwood
Attorney for Petitioner
PO Box 868
Silver City, NM 88062
(505) 538-9695

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QUESTION PRESENTED FOR REVIEW

Does the Fourth Amendment permit Border Patrol agents to stop a vehicle based on observations of what they consider to be suspicious circumstances, when using the same observations would allow them to stop a large percentage of the vehicles travelling on the same highway?

REFERENCE TO REPORTS OR OPINIONS

The Order and Judgment of the Tenth Circuit Court of Appeals entered December 22, 1997, appears in the Appendix. It will not be published. It is cited as follows:

United States v. Huereque-Mercado,
No. 97-2009, (10th Cir. December 22, 1997).

GROUNDS FOR JURISDICTION

This court has jurisdiction over this case pursuant to 28 U.S.C. 1254(1). The trial court had jurisdiction pursuant to 18 U.S.C. 3231.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV states, in pertinent part, as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 9, 1996, at about 7:30 a.m., Petitioner's vehicle was stopped by a U.S. border patrolman as it traveled north from the border in southern New Mexico. At the suppression hearing held in the case, the border patrolman cited several things he observed about the vehicle that he considered suspicious. These included the following:

1. The truck was travelling on a highway near the border;

2. The truck had Arizona license plates;

3. The truck was registered to a Hispanic male from Phoenix, Arizona and was being driven by a Hispanic male;

4. Phoenix is a common drug-smuggling destination;

5. The truck had a large bumper which could have concealed a false bed;

6. The truck bumper had holes for two license plate lights but only had one light, while the other hole was empty;

7. The truck was headed north within an hour to an hour and a half of a border patrol shift change;

8. There was an air freshener hanging from the rear view mirror.

The border patrolman discovered marijuana in the bed of the pickup after he stopped the Petitioner. Petitioner moved to suppress the evidence seized during the stop on the grounds that the agent lacked reasonable suspicion to stop his vehicle.

Petitioner presented evidence as to the traffic volume on the highway in question. He also presented the testimony of an investigator who had observed traffic on that same stretch of highway on the same day of the week and at the same time of day that the Petitioner had been stopped. That evidence showed that using the same criteria that the border patrolman cited as his basis for stopping the Petitioner, the border patrol could have stopped more than half of the northbound vehicles on that highway.

Petitioner argued that relying on the same factors would allow the border patrol to stop an impermissibly large percentage of highway traffic because they did not provide the kind of particularized suspicion of illegal activity required by the Fourth Amendment.

The trial court denied Petitioner's motion to suppress and the Tenth Circuit Court of Appeals affirmed the trial court's decision.

ARGUMENT

Border Patrol agents are only allowed to stop vehicles when they are aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that a vehicle's occupants may be engaged in criminal activity. **U.S. v. Brignoni-Ponce**, 422 U.S. 873, 884 (1975). Agents may consider the totality of the circumstances, **U.S. v. Cortez**, 449 U.S. 411 (1981), but may not stop a vehicle based on an "unparticularized suspicion or hunch", **Terry v. Ohio**, 392 U.S. 1, 27 (1968). In the instant case, the facts observed by the agent regarding the Petitioner were consistent with innocent travel. The so-called suspicious factors the agent observed also applied to so many other vehicles travelling the same road that they did nothing to focus particularized suspicion on the Petitioner or set his vehicle apart from the many other vehicles on the road that had similar idiosyncracies. Based on the uncontested observations of traffic contained in the record, allowing the border patrol to rely on the factors it cited as suspicious in this case will allow the border patrol to stop half or more of the vehicles travelling north from the border on the highway in question. It is impossible to imagine that the

framers of the Constitution would have considered this to be reasonable under the Fourth Amendment, since it gives border patrol agents virtually unfettered discretion to stop almost any car on the highway by simply finding some idiosyncracy on a vehicle that is travelling in a high-smuggling area.

The Tenth Circuit's opinion in this case will allow Border Patrol agents to stop vehicles based on a hunch, as long as the hunch can be somehow related to a Border Patrolman's education or experience. If allowed to stand, there will be virtually no Fourth Amendment protection remaining for travelers in the border area. For this reason, Petitioner believes that this Court should review the Tenth Circuit's decision in this case.

REQUEST FOR RELIEF

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted, along with any other appropriate relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served on Respondent United States of America by mailing a correct copy to the Solicitor General of the United States, Room 5614, Dept. of Justice, 10th St. and Constitution Ave., N.W., Washington, D.C. 20530, this 20 day of Feb., 1998.

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Case No. 97-2009
(D.C. No. CR.96-376-HB)
(District of New Mexico)

DANIEL HUEREQUE-MERCADO,

Defendant-Appellant.

ORDER AND JUDGMENT

before **TACHA, HENRY**, and **LUCERO**, Circuit Judges.

The defendant Daniel Huereque-Mercado appeals the district court's order denying his motion to suppress evidence discovered in Mr. Huereque-Mercado's pickup truck after a traffic stop by a roving border patrol agent. He argues that the stop was not supported by reasonable suspicion and therefore violated the Fourth Amendment. We disagree and therefore affirm the district court's decision.

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of order and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R.36.3.

I. BACKGROUND

In an indictment filed in July 1996, the government charged Mr. Huereque-Mercado with possession of more than 100 kilograms of marijuana with the intent to distribute it, a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Mr. Huereque-Mercado moved to suppress the evidence that a border patrol agent had discovered in Mr. Huereque-Mercado's pickup truck on June 9, 1996. The district court conducted an evidentiary hearing and denied the motion. Mr. Huereque-Mercado entered a guilty plea, and the court sentenced him to sixty months' imprisonment.

As developed at the evidentiary hearing, the record indicates that Mr. Huereque-Mercado was stopped by United States Border Patrol Agent Joseph Muniz around 7:30 a.m. on June 9, 1996, as he proceeded north on New Mexico Highway 11, approximately twenty-one miles north of the Mexican border. Agent Muniz testified that, as he was driving south on Highway 11, he saw a late model pickup with Arizona plates heading north.

For several reasons, Agent Muniz suspected that the driver of the truck might be engaged in smuggling contraband into the United States from Mexico. First, he said, Highway 11 was a preferred route for smugglers because it allowed them to drive north

and avoid I-10, the more heavily traveled and patrolled interstate highway. Also, a paved road intersecting Highway 11 runs parallel to the border between the United States and Mexico about three miles north of it, in some places passing within a quarter of a mile of it. Additionally, the agent testified, the early morning is a preferred time for smugglers because border patrol agents change shifts then, and as a result, there are fewer agents on the road.

According to Agent Muniz, the kind of vehicle that he saw also made him suspicious—"[p]ickups are a preferred type of vehicle that smugglers like to use because of their roominess." See Rec. Vol. I at 57 (Tr. Of Evidentiary Hr'g of Sept. 5, 1996). Agent Muniz also noted that the pickup had Arizona plates. "That caught [his] attention because Arizona is one of the more popular destinations for smuggling loads that [originate] out of Columbus [,N.M.] area." Id.

Agent Muniz turned around and started following the truck as it proceeded north on Highway 11. He then observed that the pickup had a large chrome bumper and was missing one of its license plate lights. He explained that these observations provided further grounds for suspicion because he knew of several instances in which the bed of a pickup had been modified so that it could be

used to transport contraband and in which the same type of bumper had been used to conceal the modifications. Id. at 57-58. Quite often, he added, smugglers who modify pickup beds fail to reinstall the electrical connections and, as a result, some of their vehicles' lights do not function. Id. at 58-59.

As he followed the pickup, Agent Muniz called for vehicle registration information. He learned that the truck was registered to two men from Phoenix (neither one of which was the defendant Mr. Huereque-Mercado) and that the vehicle had not passed through one of the designated ports of entry into the United States. To Agent Muniz, both of these facts were suspicious. As to the addresses of the owners, he said that Phoenix was a popular destination city for smuggling. As to the fact that the truck had not passed through an official port of entry, Agent Muniz said that it was unusual because most people in the area usually drove into the border town of Palomas, Mexico to sight-see or shop. Id. at 60.

Finally, as he followed the vehicle, Agent Muniz noticed air-freshener hanging from the rear-view mirror. He explained that air-fresheners were frequently used to mask the odor of illegal drugs. Agent Muniz said that even drug smugglers hiding drugs in secret compartments in the back of pickups use air freshener, "maybe

[because of] a sense of paranoia, that somebody can detect the odor." Id. at 62.

Based on all these facts, Agent Muniz stopped the pickup. As he approached it, he noticed a vinyl cover over the bed. He saw the driver's baggage in the cab, along with a CB radio, a cell phone, and a pager on the dash board. There was a strong odor of air freshener. He questioned the driver, Mr. Huereque-Mercado, who said he was a resident alien and produced a resident alien card. Agent Muniz asked Mr. Huereque-Mercado who owned with truck, and the agent became even more suspicious when Mr. Huereque-Mercado, contradicting the information Agent Muniz had received over the radio about the truck's registration, said that he owned it.

Agent Muniz then asked permission to search the truck, and Mr. Huereque-Mercado agreed. He discovered several large packages wrapped in paper in the bed of the pickup and asked Mr. Huereque-Mercado what they contained. After Mr. Huereque-Mercado smiled and shrugged his shoulders, Agent Muniz placed him under arrest. Agent Muniz then brought his drug-sniffing dog over to the truck. The dog alerted to the packages in the back of the pickup, and Agent Muniz discovered that they contained 673 pounds of marijuana.

On cross-examination, Mr. Huereque-Mercado extracted several admissions that impeached Mr. Muniz's testimony to some degree. First Agent Muniz admitted there was no indication that Mr. Huereque-Mercado knew about the morning shift change of border patrol agents. Also, the agent explained that the shift change occurred at 6:00 a.m., significantly earlier than the 7:30 a.m. stop and arrest at issue here. Cross-examination also revealed that Agent Muniz had no idea what percentage of vehicles on Highway 11 had out-of-state plates, what percentage were pickup trucks, or what percentage of pickup trucks had large bumpers. He also admitted that the truck was not dusty or muddy, as it might have been if it had crossed the border by leaving paved roads to avoid detection.

Mr. Huereque-Mercado then called several witnesses in support of his motion to suppress. An engineer from the New Mexico Highway and Transportation Department testified that, in 1994, the average daily traffic count was 2,649 vehicles (north and south bound) for the section of Highway 11 at issue in this case. See Rec. vol. II at 85 (TR of Evidentiary Hr'g of Sept. 5, 1996). For 1995, the projected traffic count was 2,271. See id. at 86. A service department manager for a car dealership testified that it is "quite common" for individuals buying pickups to order special bumpers

that may be used for towing. See id. at 89. After examining a photograph of the bumper on Mr. Huereque-Mercado's pickup, the manager said that he had seen many like it. The manager also said that it was not unusual to find a pickup with a larger bumper that had only one license plate light. However, on cross-examination the manager admitted that there was no towing ball on Mr. Huereque-Mercado's truck and that, as a result, the large bumper did not appear to have been used for the most common lawful purpose.

Mr. Huereque-Mercado then presented testimony from two witnesses who had counted the passing vehicles on Highway 11 between approximately 7:00 and 8:00 a.m. at the location of the instant traffic stop. The first of these witnesses testified that on one morning she had counted forty-one vehicles, noting that twenty of them were pickup trucks, vans, or sport utility vehicles and that one or two of the vehicles had Arizona plates. See id., at 94-95. She also saw three border patrol vehicles.

The second of these witnesses testified that he had counted vehicles at the same time at the same spot on two other mornings. On the first of these mornings, he counted forty-five vehicles (including twenty-two vans, pickups, or sport utility vehicles; ten

vehicles with either out-of-state plates, Mexican plates, or no plates at all; and five law enforcement vehicles). See id., at 106-07. On the second morning, he counted fifty-three vehicles (twenty-nine vans, pickups, or sport utility vehicles; thirteen vehicles with out-of-state plates, Mexican plates, or no plates at all; and one border patrol vehicle). See id., at 109-110.

At the conclusion of the evidence, the district court issued an oral ruling denying Mr. Huereque-Mercado's motion to suppress. In its subsequent written order, the court relied on the following factors in concluding that Agent Muniz had a reasonable suspicion that Mr. Huereque-Mercado was engaged in criminal activity as he drove north on Highway 11 on the morning of June 9, 1996:

> (1) New Mexico [H]ighway 11 is the only paved road in the area leading directly north from the United States-Mexico border and is a notorious smuggling passageway for both contraband and illegal aliens.
> (2) The time at which he first noticed Defendant's vehicle is the station shift change, a preferred time for smugglers to attempt to move contraband north.
> (3) The type of vehicle Defendant was driving is commonly used to smuggle drugs or aliens.
> (4) Defendant's vehicle had an Arizona license plate, which is [a] common destination for many illegal smuggling loads crossing the border.
> (5) The port of entry lane check indicated the vehicle had not come through the border.
> (6) An air freshener was hanging from the vehicles's mirror; such air fresheners commonly are used to mask the

odor of illegal drugs.
(7) Based on his experience, the vehicle's unusually large rear bumper and the missing rear license plate light indicated the bed of the truck may have been altered.

Rec. Vol. I at 29-30 (Memorandum Opinion and Order filed Sept. 13, 1996).

II. DISCUSSION

On appeal, Mr. Huereque-Mercado challenges the district court's conclusion that when he stopped the pickup Agent Muniz had a reasonable suspicion that Mr. Huereque-Mercado was committing a crime. He contests each factor relied on by the district court and the government, arguing that the stop violated the Fourth Amendment and the evidence seized should therefore be suppressed.

In reviewing the denial of a motion to suppress, we must accept the district court's factual findings unless they are clearly erroneous. United States v. Lopez-Martinez, 25 F.3d 1481, 1483 (10th Cir. 994). We "must consider the evidence in the light most favorable to the government." United States v. Maestas, 2 F.3d 1485, 1490 (10th Cir. 1993). However, we review de novo the ultimate determination of whether a search or seizure is reasonable

under the Fourth Amendment. (Lopez-Martinez, 25 F.3d at 1483.

As the parties and the district court have noted, border patrol officers on roving patrol are not required to establish probable cause before making a traffic stop. See United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975). Instead, border patrol agents may make traffic stops upon a showing that "'they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion' that those vehicles' occupants may be involved in criminal activity." United States v. Cantu, 87 F.3d 1118, 1121 (10th Cir.) (quoting Brignoni-Ponce, 422 U.S. at 884), cert. denied, 117 S. Ct. 265 (1996). The Supreme Court has explained that this reasonable suspicion standard reflects a balancing of "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border." Brignoni-Ponce, 422 U.S. at 881; see also Lopez-Martinez, 25 F.3d at 1483 (discussing Brignoni-Ponce).

In Brignoni-Ponce, the Court set forth a list of eight factors that border patrol agents may consider in determining whether there is reasonable suspicion to stop a vehicle near the border: (1) the

characteristics of the area in which the vehicle is encountered; (2) the proximity to the border; (3) the usual patterns of traffic; (4) the agent's previous experience with alien traffic; (5) information about recent illegal border crossings in the area; (6) the driver's behavior, including any obvious attempts to evade the agents; (7) characteristics of the vehicle; and (8) the appearance that the vehicle is heavily loaded. Brignoni-Ponce, 422 U.S. at 884-85; see also United States v. Monsisvais, 907 F.2d 987, 990 (10th Cir. 1990) (discussing these Brignoni-Ponce factors). This list is not exhaustive, and "[n]either Brignoni-Ponce nor its progeny identify a minimum number of factors necessary to constitute reasonable suspicion or any outcome-determinative criteria." Lopez-Martinez, 25 F.3d at 1484.

Instead, the determination of reasonable suspicion must be made by examining "the totality of the circumstances." Cantu, 87 F.3d at 1121 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). Border patrol agents are entitled to assess the facts in the light of their experience, and, as a result, we have recognized that they "may perceive meaning in actions that appear innocuous to the untrained observer." Id. (citing Brown v. Texas, 443 U.S. 47, 52 &

n.2 (1979)). Additionally, reasonable suspicion may be based on "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." Lopez-Martinez, 25 F.3d at 1484 (10th Cir. 1994) (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)). Although "the necessary 'level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence,' the Fourth Amendment requires 'some minimal level of objective justification.'" Cantu, 87 F.3d at 1121 (quoting United States V. Sokolow, 490 U.S. 1, 7 (1989) (quoting I.N.S. v. Delgado, 466 U.S. 210, 217 (1984))).

The reasonable suspicion analysis must be considered on a case-by-case basis, United States v. Martin, 15 F.3d 943,950 (10th Cir. 1994), and cannot be reduced to "'a neat set of legal rules,'" Lopez-Martinez, 25 F.3d at 1484 (quoting Sokolow, 490 U.S. at 7). However, it is useful to consider some of our prior decisions in this area, beginning with those cases in which we have concluded that traffic stops made by border patrol agents comported with the Fourth Amendment.

In Lopez-Martinez, border parol agents observed a van and a sedan existing the interstate near the Mexican border and less than

ten miles south of a checkpoint. The sedan left the interstate and proceeded on a state highway that was a known smuggling route. The agent following the vehicles noticed that there were four Hispanic men in the sedan. When the agent pulled in between the van and the sedan, the sedan dropped back about 100 yards. Both vehicles were driving about thirty miles an hour in a fifty-five miles per hour zone, and the agent saw a passenger in the van stare at the agent for twenty to thirty seconds and then drop back out of sight. In affirming the district court's decision that the agent had the necessary reasonable suspicion that the vehicles were transporting undocumented aliens, we identified the following factors: the characteristics of the area (the highway in question passed through minimally populated desert and was a slower and more circuitous route than the interstate and a large number of illegal aliens had been apprehended there); the proximity of the area to the border; the usual patterns of traffic on the particular road (the record indicated that the time of the stop was a period of particularly low traffic); the officer's experience; and the behavior of the driver and passengers.

Similarly, in United States v. Barbee, 968 F.2d 1026 (10th Cir.

1992) we upheld the district court's finding of reasonable suspicion when the agents observed the defendant's car traveling north on a known smuggling route and further observed the cars' passengers crouching down out of sight after the agents followed the car and shined their high beams on it. We reasoned that two agents with experience in the area had testified about "the location of the road, the typical nature of the traffic at that time of year and that time of day..., and their experience with alien and drug smugglers." Barbee, 968 F.2d at 1029. We also emphasized the passengers' suspicious behavior. Several of our other decisions have followed reasoning similar to Lopez-Martinez and Barbee in concluding that border patrol agents had reasonable suspicion to effect a brief investigative detention. See, e.g., United States v. Pollack, 895 F.2d 686 (10th Cir. 1990) (finding reasonable suspicion when a pickup truck passed though a checkpoint at 3:00 a.m., the driver asked for directions to the nearest gas station, and when, forty-five minutes later, sensors detected the same pickup traveling close to another vehicle on the highway that circumvented the checkpoint); United States v. Merryman, 630 F.2d 780 (10th Cir. 1980) (finding reasonable suspicion when the defendant's truck stopped before

coming to a checkpoint and then made a U-turn and drove away, and when an agent following the truck then observed lumpy objects in the back); United States v. Lebya, 627 F.2d 1059 (10th Cir. 1980) (finding reasonable suspicion when agents observed a heavily-loaded truck and a camper traveling on an east-west highway close to the border and then turning north).

In contrast to these cases, other decisions illustrate the kinds of circumstances in which we have found that border patrol agents lacked reasonable suspicion. For example, in United States v. Guillen-Cazares, 989 F.2nd 380 (10th Cir. 1993), agents observed two cars driving close together on a state highway that intersected I-25 near a checkpoint at about 10:25 p.m. The agents noticed that the first car appeared to contain quite a few people and that the second car seemed to be riding a little low. As they approached the cars, one agent noticed that he could no longer see the passenger in the second car. We reversed the district court's conclusion that these facts established reasonable suspicion to stop the two cars. We noted that the facts in this case—a car turning south instead of north and the fact that the lead vehicle contained more people than the second car—did not fit the classic smuggling pattern described

by the agents during their testimony at the suppression hearing. We said that "the fact [that the] defendant was traveling at night on a known smuggling road, with one passenger, in a vehicle which slanted to the rear and was following a car with several passengers" and "the fact [that] the passenger slouched down at some point after the car entered I-25 south,...do not reasonably warrant suspicion [that] the defendant's vehicle was smuggling aliens or narcotics." Guillen-Cazares, 989 F.2d at 384.

United States v. Monsisvais, 907 F.2d 987 (10th Cir. 1990) provides another illustration of facts failing to establish reasonable suspicion. Around 7:30 p.m., border patrol agents observed a pickup truck with a camper shell that was "riding extremely heavy" traveling north on a highway that bypassed an I-25 checkpoint. Monsisvais, 907 F.2d at 988. The truck had Arizona plates, and the agent said that as the truck approached the on-ramp to I-25 north, the driver slowed down, corrected his turn, and then turned onto I-25 south instead. The agent believed that the driver did this in response to seeing a border patrol car. Upon considering this evidence, we reversed the district court's conclusion that the stop was supported by reasonable suspicion. We noted that the record

was barren as to the legitimate uses of the state highway. We also attached little significance to the Arizona plate. We further reasoned that the driving maneuvers observed by the agents were not significant. We noted that according to the agents' testimony, they would have been suspicious whether the truck had turned north (the direction that smugglers usually travel) or south (the direction that smugglers travel when they think they may be under observation). We added that the agents had admitted that the intersection was confusing and that out-of-state drivers might well slow down for innocent reasons.

United States v. Miranda-Enriquez, 941 F.2d 1081 (10th Cir. 1991) provides a final example of border patrol agent's observations that we found insufficient to establish reasonable suspicion. In that case, agents observed a car with out-of-state plates traveling north at 9:00 p.m. along a state highway known for smuggling. They saw dust on the car as it passed by and noticed several unidentified shapes in the back seat. As he flashed his lights on the car when it passed through an intersection, the driver appeared "frozen" and did not look left or right. Miranda-Enriquez, 907 F.2nd at 1082. In finding a lack of reasonable suspicion, we

reasoned that the agent had acknowledged that it was not unusual for cars on the highway in question to be covered with dust, that the agent provided no specific information about the likelihood of encountering smugglers at the time of day that the stop was made, and that little significance should be attached to the driver's failure to look left or right when the agent saw him because it was possible to see oncoming cars before reaching the intersection.

In applying these decisions to the instant case, we first note that in explaining his decision to stop Mr. Huereque-Mercado on the morning of June 9, 1996, Agent Muniz identified four of the factors listed by the Supreme Court in Brignoni-Ponce as grounds for reasonable suspicion: (1) the characteristics of the area in which he encountered Mr. Huereque-Mercado's truck (New Mexico Highway 11, a route preferred by smugglers, according to the agent's testimony); (2) the proximity of the area to the border (about twenty-one miles north of it); (3) the usual patterns of traffic on the road in question (i.e. the fact that he observed Mr. Huereque-Mercado at 7:30 a.m., a preferred time for smugglers, according to the agent); and (4) the characteristics of the vehicle (a pickup with a large bumper, a missing license plate light, and air freshener

hanging from the rearview mirror). Although several of these factors may have appeared entirely innocent to the untrained observer, Agent Muniz was entitled to rely on his experience as a border patrol agent in concluding that the totality of the circumstances warranted further investigation. See Lopez-Martinez, 25 F.3d at 1484 (noting that a series of innocent acts may justify further investigation and that the border patrol agent may consider the totality of the circumstances in making the determination of whether he has the reasonable suspicion necessary to make a stop). Moreover, the factors identified by Agent Muniz in justifying the stop are similar to those relied on by the border patrol agents in several of our prior decisions that have upheld the determination of reasonable suspicion. See Lopez-Martinez, 25 F.3d at 1485-86 (considering, inter alia, the proximity to the border, the time of day, the agent's testimony that the road in question was preferred by smugglers, and the fact that the defendant's van was able to conceal several passengers from passerbys); Barbee, 968 F.2d at 1029 (considering, inter alia, the location of the road, the typical traffic, and the agents' experience with smugglers); Pollack, 895 F.2d at 6909-91 (concluding that the time of day, the fact that

the defendant was driving on a known smuggling route, and the fact that he was driving a large vehicle capable of hauling many people all supported a finding of reasonable suspicion); Lebya, 627 F.2d at 1063-64 (concluding that the time of day, the nature of the road, and the appearance of the vehicle supported finding of reasonable suspicion); Sperow, 551 F.2d at 880-881 (concluding that the fact that the defendant was driving a heavily-loaded truck a mile and a half from the border supported a finding of reasonable suspicion).

On the other hand, we acknowledge that some of the reasons offered by Agent Muniz as grounds for stopping Mr. Huereque-Mercado are of questionable significance in undertaking the reasonable suspicion analysis. In particular, several of our decisions have criticized the border patrol's reliance on a vehicle's out-of-state license plates as grounds for making a stop. See, e.g., United States v. Martinez-Cigarroa, 44 F.3d 908, 911 (10th Cir 1995) ("[W]hile out-of-state license plates may be a relevant consideration in some circumstances, this factor in and of itself is not significantly probative of illegal activity and adds little to the reasonable suspicion equation."); Monsisvais, 907 F.2d at 991 ("Although Arizona cars must certainly be less common on this

stretch of road than those bearing New Mexico plates, we cannot find any basis in the record from which to conclude that Arizona-plated vehicles are any more likely to be transporting aliens...than are vehicles bearing the license plates of New Mexico, or for that matter, Texas or Colorado."); Lebya, 627 F.2d at 1064 ("That the vehicle bore out-of-state plates, as do 50 percent of all vehicles in which aliens are apprehended, is of little significance here simply because Arizona is relatively near.")

Additionally, we agree with Mr. Huereque-Mercado that there are flaws in Agent Muniz's reasoning regarding the significance of the time of day when the stop was made. Although Agent Muniz testified that the early morning was a preferred time for smugglers because that was when border patrol agents changed shifts, he also stated that the shift change actually occurred around 6:00 a.m., an hour and a half before the stop at issue here. Moreover, as we have noted the testimony offered by Mr. Huereque-Mercado about the pattern of traffic on Highway 11 at the time when the stop actually occurred indicated that several agents were on patrol then, thus undermining Agent Muniz's suggestion that smugglers could more easily avoid encountering law enforcement agents by driving at that

hour. Also, the testimony presented by Mr. Huereque-Mercado regarding special bumpers on pickup trucks indicated that such bumpers were more common and had more legitimate uses than one might have concluded from Agent Muniz's testimony alone. Finally, we note that unlike some of the cases in which we have found reasonable suspicion, Agent Muniz did not provide specific information about the number of illegal aliens or drug smugglers arrested in the area. See Lopez-Martinez, 25 F.3d at 1485 n.3 (considering agents' statistical testimony about the number of undocumented aliens arrested in the area).

Nevertheless, because we must consider the totality of the circumstances and view the record in the light most favorable to the government, we conclude that the district court properly held that the stop of Mr. Huereque-Mercado's truck was supported by reasonable suspicion. Even though Mr. Huereque-Mercado established that some of the factors on which Agent Muniz relied in justifying the stop were not as unambiguously suspicious as Agent Muniz's testimony suggested, the district court was still entitled to rely on that testimony to conclude that these factors provided some basis for reasonably suspecting Mr. Huereque-Mercado of

transporting contraband. Moreover, in comparing the facts of the instant case to those decisions in which we have found an absence of reasonable suspicion, we note that those other decisions did not involve the combination of suspicious vehicle characteristics and other Brignoni-Ponce factors that is present here. See Guillen-Cazares, 989 F.2d at 382 (vehicle traveling at night on a known smuggling route and observed to be slanting toward the rear but no indication that it had been modified to carry contraband); Monsisvais, 907 F.2d at 988 (vehicle "riding extremely heavy" but no indication that agents identified any other suspicious characteristics); Miranda-Enriquez, 941 F.2d at 1082 (concluding that dust on a car was not grounds for suspicion and noting no other suspicious characteristics). After observing a pickup (with a large bumper, a missing license plate light, and air-freshener hanging from the rearview mirror) driving twenty-one miles north of the Mexican border on a highway thought by agents to be preferred by smugglers at a time thought by agents to be preferred by smugglers, and after receiving the information that the truck had not passed through a regular border checkpoint, Agent Muniz had a "'particularized and objective basis for suspecting [Mr. Huereque-

Mercado} of criminal activity.'" Lopez-Martinez, 25 F.3d at 1487 (quoting Cortez, 449 U.S. at 4178-18). Allowing border patrol agents to make a traffic stop when presented with this particular combination of factors does not vest the agents with unbridled discretion in violation of the Fourth Amendment.

III. CONCLUSION

For the reasons set forth above, the decision of the district court is affirmed. The mandate shall issue forthwith.

Entered for the Court,

Robert H. Henry
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Cr. No. 96-376-HB

DANIEL HUEREQUE-MERCADO,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Suppress Physical Evidence, filed August 6, 1996. Having reviewed the motion, the memoranda in support and in opposition, and having heard the evidence on September 4, 1996, the Court finds that the motion should be denied.

I. Factual Background

On June 19, 1996, at approximately 7:30 a.m., United States Border Patrol Agent Joe Muniz was traveling south on New Mexico Highway 11 toward Columbus, New Mexico. Approximately sixteen miles north of the border, Agent Muniz saw a white Ford pickup with an Arizona license plate traveling northbound. Only the driver of the pickup was visible. Agent Muniz radioed the

United States Border Patrol Sector Communications and requested information about the registered owner of the truck. He also requested a port of entry lane check. Agent Muniz continued to follow the truck and noticed an air freshener hanging from the mirror. Agent Muniz also noticed that the rear bumper on the truck was uncommonly large and that one of the rear license plate lights was missing.

Subsequently, Agent Muniz was notified that the truck he was following was registered to a person named Gonzalo Garcia or Francisco J. Verdugo in Phoenix, Arizona. Agent Muniz also was informed that the truck had not formally entered the United States from one of the ports of entry. Based on all of the foregoing, Agent Muniz decided to stop Defendant at approximately highway mile marker 21.

As Agent Muniz approached the driver of the truck, he smelled a strong odor of the air freshener coming from the cab. In the cab, Agent Muniz saw, in plain view, a cellular telephone, a portable CB radio, a pager, a large green duffel bag and several pieces of clothing. Agent Muniz also noticed that the bed of the truck was covered with a vinyl cover. Agent Muniz questioned Defendant

about his citizenship. Defendant responded that he was a resident alien and showed Agent Muniz his alien registration card. Agent Muniz noted that Defendant was not the registered owner of the truck and asked Defendant whether the truck belonged to him. Contrary to the information provided to Agent Muniz by the United States Border Patrol Sector Communications, Defendant claimed he owned the truck. Agent Muniz then asked Defendant for consent to search the truck. Defendant consented to the search of the truck and got out of the truck and lowered the tailgate. Inside the bed of the truck, Agent Muniz saw several large packages wrapped in contact paper. Agent Muniz asked Defendant what was inside the bundles and Defendant smiled. Agent Muniz then retrieved his drug sniffing dog and allowed the dog to search the truck. The dog immediately alerted to the packages in the truck. Agent Muniz opened one of the packages and found a green leafy substance. Agent Muniz field tested the leafy substance; the field test was positive for marijuana.

Defendant subsequently was informed of his Miranda rights and was taken to the Deming Border Patrol Station. At the station, agents discovered approximately twenty packages in the bed of the

truck weighing a total of 673.35 pounds gross weight.

Defendant contends that the stop of his vehicle and his subsequent detention was without reasonable suspicion and was in violation of his rights under the Fourth Amendment to the United States Constitution. Defendant further contends the subsequent warrantees search of his vehicle was conducted without his valid consent.

II. Discussion

A. Initial Stop

In United States v. Cantu, 87 F.3d (10th Cir. 1996), the Court of Appeals for the Tenth Circuit delineated the law governing roving border patrol cases. The court stated:

> Border Patrol agents "on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that those vehicles' occupants may be involved in criminal activity. "[A]ny number of factors" might contribute to an agent's decision to stop a vehicle on reasonable suspicion. The law does not specify a "minimum number of factors necessary to constitute reasonable suspicion or any outcome determinative criteria." Each case turns upon its own facts. In all instances, however, the agent "is entitled to assess the facts in light of his experience" in detecting criminal activity. Law enforcement officers may perceive meaning in actions that appear innocuous to the untrained observer. This is not to say that an agent may stop a vehicle on an

> "unparticularized suspicion or hunch." While the necessary "level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence," the Fourth Amendment requires "'some minimal level of objective justification.'"
>
> In determining whether to stop a vehicle, we look at the totality of the circumstances, or in other words "the whole picture." The totality of the circumstances must create a "particularized and objective basis for suspecting the ...person stopped of criminal activity. The agent's assessment of the circumstances may depend upon objective observations, information obtained from individual, reports, or other sources, and "consideration of the modes and patterns of operation of certain kinds of lawmakers." "The process does not deal with hard certainties, but with probabilities" based upon evidence "as understood by those versed in the field of law enforcement."

Id. At 1121-122 (internal citations omitted). In this case, Agent Muniz testified that he relied on the following factors to stop Defendant:

(1) New Mexico Highway 11 is the only paved road in the area leading directly north from the United States-Mexican border and is a notorious smuggling passageway for both contraband and illegal aliens.

(2) The time at which he first noticed Defendant's vehicle is the station shift change, a preferred time for smugglers to attempt to move contraband north.

(3) The type of vehicle Defendant was driving is commonly used to smuggle drugs or aliens.

(4) Defendant 's vehicle had an Arizona license plate which is common destination for many illegal smuggling loads crossing the border.

(5) The port of entry lane check indicated the vehicle had not come through the border.

(6) An air freshener was hanging from the vehicle's mirror; such air fresheners commonly are used to mask the odor of illegal drugs.

(7) Based on his experience, the vehicle's unusually large rear bumper and the missing rear license plate light indicated the bed of the truck may have been altered.

Applying the totality of the circumstances test and in light of Agent Muniz's experience, the Court finds that Agent Muniz had ample articulable reasonable grounds for suspicion warranting Defendant's stop.

B. Continued Detention

Agent Muniz also testified that after he stopped Defendant he continued to detain him for the following reasons:

(1) As Agent Muniz approached the cab of Defendant's vehicle,

he saw, in plain view, a cellular telephone, a portable CB radio, and a pager; items he knew from experience were commonly used by drug and alien smugglers.

(2) Agent Muniz also noticed the truck bed was completely covered with a vinyl cover, arousing his suspicions that there might be hidden contraband.

(3) Defendant lied about the ownership of the vehicle.

The Court finds that these factors justify the continued detention of Defendant by Agent Muniz.

C. Consent to Search

The government bears the burden on the issue of the voluntariness of Defendant's consent. United States V. Dewitt, 946 F.2d 1497, 1500 (10th Cir. 1991). It must demonstrate with "clear and positive testimony that consent was 'unequivocal and specific' and 'freely and intelligently' given." Id. The government must also "Prove consent was given without duress or coercion, express or implied." Id. "The district court must view the question in light of the totality of the circumstances, and 'should not presume a defendant's consent to search is either involuntary...or voluntary.'" Id.

Defendant claims his consent was coerced and relies on the fact

that Agent Muniz swore a uniform and carried a gun. Agent Muniz testified he was dressed in uniform and carried a gun as part of his uniform. Agent Muniz further testified he spoke to Defendant in a professional manner without use of coercion when he asked Defendant for consent to search the vehicle. Based on Agent Muniz's testimony, the Court finds that Defendant's consent was voluntary.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress Physical Evidence is denied.

HOWARD C. BRATTON
District Judge

United States District Court

District of New Mexico

UNITED STATES OF AMERICA
v.
DANIEL HUEREQUE-MERCADO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

96 DEC 20 PM 2:58

Case Number: 2:96CR00376-001

Charles A. Harwood - Appointed
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (b)(1)(B)	Possession With Intent to Distribute More Than 100 Kilograms of Marijuana	06/09/1996	

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by the judgment are fully paid.

Defendant's Soc. Sec. No.: 585-98-5995
Defendant's Date of Birth: 04/09/1962
Defendant's USM No.: 11865-051
Defendant's Residence Address:
1221 42nd Avenue
Yuma AZ 85364
Defendant's Mailing Address:
1221 42nd Avenue
Yuma AZ 85364

12/09/1996
Date of Imposition of Judgment

Signature of Judicial Officer

Honorable Howard C. Bratton
Senior U. S. District Judge
Name & Title of Judicial Officer

12/19/96
Date

0016

DEFENDANT: DANIEL HUERREQUE-MERCADO
CASE NUMBER: 2:96CR00376-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 60 month(s).

The Court intends that an Order re: Deportation be executed and that deportation take place immediately upon the defendant's release from custody. (The defendant is not a flight risk; therefore, voluntary surrender shall be granted, pending his appeal).

☒ The court makes the following recommendations to the Bureau of Prisons:

Service of sentence nearest the defendant's place of residence in Yuma, Arizona.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☒ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

0017

By _____
Deputy U.S. Marshal

DEFENDANT: DANIEL HUERREQUE-MERCADO

CASE NUMBER: 2:96CR00376-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 year(s).

If the defendant is deported and returns to the United States during the period of supervised release, he shall immediately report to the nearest U. S. Probation Office, to complete the remaining portion of supervised release, if any.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Sheet 3A

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

0018

DEFENDANT: DANIEL HUERTQUI-MERCADO
CASE NUMBER: 2:96CR00376-001

SPECIAL CONDITIONS OF SUPERVISION

- The defendant shall submit to one drug test within fifteen (15) days of release from imprisonment, and at least two (2) periodic drug tests thereafter as directed by the U. S. Probation Officer.
- The defendant shall comply with all United States Immigration and Naturalization Service laws.

DEFENDANT: DANIEL HUERTQUI-MERCADO

CASE NUMBER: 2:96CR00376-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

0020

Totals: $ _____ $ _____

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: DANIEL HUERTEQUE-MERCADO

CASE NUMBER: 3:96CR00376-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The $100.00 special assessment is due immediately and payable by cashier's check, bank or postal money order, to: U. S. District Court Clerk, P. O. Box 689, Albuquerque, NM 87103.

(Payment must reflect: Defendant's Court Name; Case Number; and that payment is towards a $100.00 special assessment).

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

0021

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: DANIEL HUERTEQUE-MERCADO

CASE NUMBER: 2:96CR00376-001

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: II

Imprisonment Range: 57 to 71 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 10,000.00 to $ 7,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):